IN THE

Supreme Court of the United States

October Term, 1972

No. 71-1082

REUBIN O'D. ASKEW, *et al.*,

Appellants,

vs.

THE AMERICAN WATERWAYS OPERATORS, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

IEF OF APPELLEES AMERICAN INSTITUTE OF MERCHANT SHIPPING, ASSUR-CEFORENINGEN GARD, ASSURANCEFORENINGEN SKULD, THE BRITANNIA EAM SHIP INSURANCE ASSOCIATION, LIMITED, THE JAPAN SHIP OWNERS TUAL PROTECTING AND INDEMNITY ASSOCIATION, THE LIVERPOOL AND NDON STEAM SHIP PROTECTION AND INDEMNITY ASSOCIATION, LIMITED, E LONDON STEAMSHIP OWNERS' MUTUAL INSURANCE ASSOCIATION, MITED, NEWCASTLE PROTECTION AND INDEMNITY ASSOCIATION, THE RTH OF ENGLAND PROTECTING & INDEMNITY ASSOCIATION LIMITED, THE ANDARD STEAMSHIP OWNERS' PROTECTION AND INDEMNITY ASSOCIATION MITED, THE STANDARD STEAMSHIP OWNERS' PROTECTION & INDEMNITY SOCIATION (BERMUDA) LIMITED, THE STEAMSHIP MUTUAL UNDERWRITING SOCIATION, LIMITED, SUNDERLAND STEAMSHIP PROTECTING & INDEMNITY SOCIATION, SVERIGES ANGFARTYGS ASSURANS FORENING, THE UNITED NGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA) LIM-ED, THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND DEMNITY ASSOCIATION (LUXEMBOURG), AND THEIR RESPECTIVE MEMBERS

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TREATISES AND LAW REVIEWS

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The Constitutional Provision and State Statute Involved[1]

The only legislation under direct consideration on this appeal is the Florida Oil Spill Prevention and Pollution Control Act[2] (hereinafter "Florida Act"), the text of which is set forth at A56-73, and the Regulations issued thereunder,[3] set forth at A73-74. The court below held this legislation invalid in its entirety, as in violation of the Admiralty Clause of the United States Constitution: "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction."[4]

Peripherally involved are a number of international maritime conventions[5] to which the United States is a party and the vast body of "congressional enactments and

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[1] A reference to the opinion below and a statement of jurisdictional grounds are contained in Appellants' Brief, pp. 1-2, and are omitted here pursuant to Rule 40.3.

[2] Chapter 376, FLORIDA STATUTES (1970).

[3] State of Florida, Department of Natural Resources Regulations, Chapter 16B-16.08.

[4] CONSTITUTION, ARTICLE III, SECTION 2, CLAUSE 3.

[5] 1954 Convention For the Prevention of Pollution of the Sea by Oil, TIAS 4900, 12 UST 2989, 327 UNTS 3, *as amended* TIAS 6109, 17 UST 1523, — UNTS —; 1960 Safety of Life At Sea Convention (SOLAS), TIAS 5780, 16 UST 185, 536 UNTS 27 (1965); 1969 Convention Relating to Intervention on the High Seas in Relation to Oil Pollution Casualties, Executive G, 91st Cong., 2nd Sess., *ratified* 117 Cong. Rec. S14606-8 (daily ed. Sept. 20, 1971), *but not yet in force*; 1969 Convention on Civil Liability for Oil Pollution Damage, Executive G, 91st Cong., 2nd Sess., *not yet ratified or in force* (*see Senate Foreign Relations Comm., Executive Report No. 92-9, "1969 Oil Pollution Conventions and Amendments", August 5, 1971, 92nd Cong., 2nd Sess.*); 1971 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Executive K, 92nd Cong., 2nd Sess., *not yet ratified or in force.*

administrative regulations"[6] which, pursuant to the "Necessary and Proper Clause",[7] read in context with the Admiralty Clause, have effected changes in the corpus of maritime law as "found initially in the European authorities" and "augmented from time to time by the federal judiciary to accommodate needs distinctive to this nation".[8]

As the court below stated, the validity of the Florida Act was also challenged on the ground that it violated the Commerce Clause,[9] and "Certain provisions of the Act [were] under piecemeal attack on Fourteenth Amendment due process and equal protection grounds."[10] However, having held the Act violative of the Admiralty Clause, it found it unnecessary to discuss these other challenges.[11]

The Question Presented

As stated at pp. 4 and 5 of their Motion to Affirm, these Appellees disagree with Appellants' inclusion of their second question (Brief, p. 2), since an analysis of the opinion of the court below reveals that its decision was *not* based on preemption by the Federal Water Quality Improvement Act of 1970, but solely on the ground that the Florida Act was unconstitutional under the Admiralty Clause.[12] Accordingly, these Appellees maintain that only a single question is presented by this appeal:

Whether the District Court erred in declaring the Florida Oil Spill Prevention and Pollution Control Act

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[6] Opinion below, A41.

[7] CONSTITUTION, ARTICLE I, SECTION 8, CLAUSE 18.

[8] Opinion below, A41.

[9] CONSTITUTION, ARTICLE I, SECTION 18, CLAUSE 3.

[10] Opinion below, A40.

[11] *Id.*

[12] See opinion below, A47. The Federal Water Quality Improvement Act is found at 33 U.S.C. §§ 1161-75.

unconstitutional on the ground that under Article III, Section 2, of the Constitution of the United States, Congress and the federal judiciary have paramount power in the maritime field, and the Act was an unwarranted intrusion into the federal domain.

Statement of the Case [13]

Pursuant to power derived from the Admiralty Clause, read in context with the Necessary and Proper Clause, Congress has enacted a substantial amount of legislation, including the Water Quality Improvement Act of 1970[14] (hereinafter "W.Q.I.A."), specifically relating to the prevention of pollution of the navigable waters of the United States by vessels, and to civil and criminal liability for such pollution as may occur. Areas not covered by federal legislation are governed by a sizable body of general maritime law, as defined by the federal courts.

Dissatisfied with the federal law in this field, the Florida Legislature enacted the Florida Act less than three months after W.Q.I.A. became law. (Appellants' Brief, p. 6). Annexed as Table A is a Comparative Table setting forth those provisions of the Florida Act which are of principal concern on this appeal, and the corresponding provisions of federal laws and international conventions with which they are in conflict. It will be seen that the Act is most comprehensive, and purports to give Florida officials broad powers to control vessels engaged in interstate and international, as well as intrastate commerce, and to impose new

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[13] These Appellees disagree with substantial portions of Appellants' Statement, and are presenting their own, pursuant to Rule 40.3 of this Court.

[14] 33 U.S.C. §§ 1161-75; *see also* Ports and Waterways Safety and Environmental Quality Act, Pub. L. No. 92-340 (July 10, 1972).

liabilities differing widely from those imposed by the general maritime law and federal legislation.

Although shortly after the effective date of the Florida Act implementing regulations were drafted, relating not only to the Act's financial responsibility provisions, but to those which dealt with manning of vessels, reporting of discharges, containment gear, and other matters, apparently the only regulations actually adopted prior to the entry of the temporary restraining order herein concerned financial responsibility. (A73-74). These provided that no vessel carrying oil, gasoline, pesticides, ammonia, chlorine or other hazardous materials as cargo would be permitted to enter any Florida port for any purpose on or after March 1, 1971, without the required certificate of financial responsibility.[15] Although the Regulations officially became effective on that date, the Florida authorities let it be known that they would not actually prevent vessels lacking the required certificates of financial responsibility from using Florida ports until March 15th. Between March 1st and March 15th, however, warning citations were issued to vessels using Florida ports without having such certificates on board. (T 91)

These proceedings, seeking to have the Florida Act declared unconstitutional, and to have the state authorities restrained from enforcing it, were instituted March 9, 1971 by The American Waterways Operators Inc., the national trade association of the barging and towing industry, and various of its members. Their complaint alleges (A6) and the answer admits (A27), that the Department of Natural Resources acting through its agents, officials and employees, had notified the public and plaintiffs that it was presently implementing, administering and enforcing the provisions of the Florida Act and would implement, ad-

[15] State of Florida, Department of Natural Resources Regulations, Chapter 16B-16.08(1); see A73.

minister and enforce the financial responsibility Regulations issued thereunder after March 15, 1971, unless the state authorities were restrained by the district court, and that the authorities were presenting warning citations to plaintiffs, and to others similarly situated, for alleged violations of the Florida Act and Regulations.[16]

On March 11, 1971, these Appellees (American Institute of Merchant Shipping [hereinafter "AIMS"] and 15 shipowners' "protection and indemnity" insurance associations [hereinafter "P. & I. Associations"], and their respective members) moved for leave to intervene as plaintiffs. A similar motion was made by Appellees Suwannee Steamship Co. and Commodores Point Terminal Co. Both motions were granted on consent. (T 11-14)

AIMS, the national trade association of the American steamship industry, is composed of 35 American companies owning and operating approximately 520 United States flag ocean-going vessels of all types engaged in the domestic and foreign trades. (Intervening Complaint [A16]).

The 15 P. & I. Associations are composed of the owners and operators of approximately 75% of the world's ocean-going tonnage, flying the flags of almost every maritime country, including about 4 million tons under the American flag. The members of each of the Associations mutually insure one another on the indemnity principle, through the medium of their particular association, against various liabilities arising out of the ownership and operation of their vessels, including liability for pollution damage caused by the discharge of oil and other substances. As of March 11, 1971, a substantial number of vessels owned or operated by members of the Associations had scheduled calls of their vessels at Florida ports. (Motion of AIMS and the P. & I. Associations for leave to intervene, granted

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[16] See, *e.g.*, T 91 where Eastern Seaboard Petroleum's Mr. Connolly testified that a warning citation had been issued on March 1st.

on consent [Record, Doc. No. 3]; and see Intervening Complaint [A16, 17] and Appellants' Brief, p. 7).

In their intervening complaint, AIMS and the P. & I. Associations asked that the Florida Act be declared unconstitutional, and therefore null and void and of no effect insofar as it purported to bear on the movement of vessels engaged in maritime commerce, and sought a permanent injunction against enforcement of the Act and any Regulations issued thereunder. (A10)

Following a hearing, a temporary restraining order was issued. A three-judge court was then convened, and after a further hearing, that court handed down its decision (A39-55), declaring the Florida Act an unconstitutional intrusion into the federal maritime domain and permanently enjoining its enforcement.

The three-judge court further held that despite a severability clause, the Florida Act must fall in its entirety, because if the invalid provisions were deleted the Act "would not comprise a coherent legislative scheme". (A47) Appellants have conceded this point. (Brief, p. 8)

The Florida authorities appealed the decision directly to this Court. On March 20, 1972, AIMS and the Associations, joined by Appellees Suwannee Steamship Co. and Commodores Point Terminal Corporation, moved to affirm. On April 17, 1972, this Court noted probable jurisdiction, without referring to the motion.[17]

Summary of Argument

AIMS and the P. & I. Associations' Argument may be summarized in the form of a conventional syllogism, the major premise whereof is that under the Admiralty Clause of the United States Constitution, no state laws in the mari-

[17] 40 U.S.L.W. 3497 (April 18, 1972).

time field are valid if (1) they contravene the essential purpose expressed by an Act of Congress, or (2) they are contrary to the general maritime law or interfere with its proper harmony and uniformity (Point I, pp. 13 to 33, *infra*); the minor premise is that the Florida Oil Spill Prevention and Pollution Control Act does both (Point II, pp. 33 to 52, *infra*). The conclusion therefore follows that the Act is unconstitutional, as the court below has held, and its decision should therefore be affirmed.

I

The Admiralty Clause is not merely a grant of jurisdiction in admiralty and maritime cases to the federal judiciary; while the clause is couched in terms of judicial power, by implication it authorizes the federal courts to define the general maritime law which is to prevail throughout the United States and, when read in context with the "Necessary and Proper" Clause, it grants to Congress paramount power to legislate in the maritime field. *The Lottawanna,* 88 U.S. 558 (1875).

The maritime law is subject to modification by Congress "as experience or changing conditions might warrant". *Panama R. R. Co. v. Johnson,* 264 U.S. 375 (1924). Typical of such legislation is the Act for the Extension of Admiralty Jurisdiction[18] (hereinafter "Admiralty Extension Act"), which brings within the admiralty jurisdiction claims for injuries to persons or property on land, caused by vessels afloat in the navigable waters of the United States, and makes them subject to substantive maritime law. Therefore, not only claims for water pollution and pollution damage to other vessels, but also claims for pollution damage to shore side property caused by vessels are subject to federal maritime law.

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[18] 46 U.S.C. § 740.

Since federal power in the maritime field is paramount, state statutes in the field are invalid if they contravene federal legislation. *The Moses Taylor*, 71 U.S. 411 (1866). State statutes are likewise invalid if they contravene the general maritime law or interfere with its proper harmony and uniformity. *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917); *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149 (1920). The same principle applies to non-statutory rules of law adopted by state courts. *Chelentis* v. *Luckenbach Steamship Co.*, 247 U.S. 372 (1918); *Kermarec* v. *Compagnie Generale*, 358 U.S. 625 (1959); and see *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970). When the area is one covered neither by federal legislation nor by a previously announced rule of the general maritime law, this Court will fashion such a rule, in the interest of nationwide harmony and uniformity. See *Kermarec* v. *Compagnie Generale, supra*; *Southern Pacific Co.* v. *Jensen, supra.*

II

The Florida Act contravenes a number of federal statutes and international conventions; it is contrary to the general maritime law and interferes with its proper harmony and uniformity. A comparative table illustrating the more important of these conflicts is annexed hereto as Table A. Among the federal statutes with which the Florida Act conflicts are several relating to water pollution;[19] the Limited Liability Act;[20] the Judicial Code;[21] the statutes relating to construction, inspection and manning of vessels;[22] the Wreck Statute,[23] and the Ports and

[19] See pp. 33-34, *infra*, and notes 45-54.

[20] 46 U.S.C. §§ 183-89.

[21] 28 U.S.C. § 1333.

[22] 46 U.S.C. §§ 361-436, *and see* 46 C.F.R. §§ 1-199.

[23] 33 U.S.C. §§ 409-14.

Waterways Safety and Environmental Quality Act.[24] The international conventions with which the Florida Act conflicts include several relating to water pollution [25] and the Safety of Life at Sea Convention.[26]

The Florida Act cannot be justified under the "police power". *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440 (1960), on which Appellants so heavily lean, is readily distinguishable; the case involved a municipal ordinance imposing a nominal fine and a brief jail sentence for smoke emission. The Florida Act, on the other hand, would, if valid, constitute a highly elaborate legislative program covering almost every facet of water pollution, and would impose an intolerable burden on intrastate, interstate and international maritime commerce.

The provisions of the Florida Act are concededly nonseverable,[27] and the decision of the court below declaring it unconstitutional in its entirety and enjoining its enforcement should therefore be affirmed.

ARGUMENT

Preliminary Statement

Appellants argue (Brief, pp. 23-25) that "The subject [of this appeal] is water and the need to conserve it." AIMS and the P. & I. Associations most emphatically disagree. There is no controversy whatever concerning the need for conservation of our water resources; broad, enforceable and uniform national laws and international conventions designed to improve the quality of water and to

[24] Pub. L. No. 92-340 (July 10, 1972).

[25] *See* note 5, *supra*.

[26] TIAS 5780, 16 UST 185, 536 UNTS 27 (1965).

[27] Appellants' Brief, p.8.

provide machinery for cleaning up discharges of oil and other pollutants have received the enthusiastic support of all responsible members of the maritime community.

Ecology is *not* the subject of this appeal; the sole question is whether or not under the Admiralty Clause of the United States Constitution the Florida Legislature had the right to enact legislation purporting, among other things, to give state employees power to board and inspect domestic and foreign vessels entering Florida waters; to prohibit entry of vessels not manned, equipped or seaworthy to the satisfaction of state employees, even though they might meet federal and international requirements; to prohibit the use of Florida ports to domestic and foreign vessels unless their owners or operators provided state officials with satisfactory evidence of financial responsibility; to impose liabilities differing widely from those established under the general maritime law, and to give a state department exclusive jurisdiction to decide, administratively, whether a recovery by the State for water pollution (liability for which the Florida Act would make absolute) should, as a matter of "privilege", but not of right, be waived if the department should find that the occurrence was caused by an act of God, war, government or a third party.

Appellants' Brief contains a great many inaccurate statements concerning the cost of cleaning up discharges of oil, the TORREY CANYON incident, the litigation which followed it, and other factual matters. These are, however, entirely irrelevant to the sole issue which this Court is called upon to decide, and therefore AIMS and the P. & I. Associations consider it unnecessary to answer them specifically. The need for conservation of our national water and other resources is fully recognized; the issue is simply whether water conservation legislation affecting vessels employed on navigable waters of the United States should become the province of the legislatures of each of the states, or whether it should be left in the federal domain.

AIMS and the Associations submit that the answer to this question is entirely clear: While the states are free to enact legislation in any sphere, including the ecological, if it does not intrude in the federal domain, under the Admiralty Clause of the Constitution (read in context with the Necessary and Proper Clause), only Congress has the power to legislate substantively with respect to vessels employed on waters within the admiralty and maritime jurisdiction of the United States, in international, interstate, or even intrastate commerce, except in areas of purely local concern.

Appellants (Brief, p. 40) seem to be under the impression that nothing but the profit motive brings vessels carrying oil and other pollutants to Florida ports. Aside from the fact that by no means every voyage a vessel makes results in a profit, the ultimate reason why vessels come to the ports of Florida—or any other state— is of course the public's demand for water-borne products. The very serious energy shortage which the United States is facing is a matter of common knowledge. Oil and other commodities which have the potential to cause water pollution are brought here in an effort to satisfy the public's demand for energy, and if the carrier, or the exporter, or the importer is able to make a profit on his services, this is not to be condemned.

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ciary, rather than to state law, unless the area is one of purely local concern and does not require nation-wide harmony and uniformity. *London Guarantee & Accident Co.* v. *Industrial Commission*, 279 U.S. 109, 124 (1929). In the cited case, this Court said, in holding a state compensation statute inapplicable to a seaman:

> "Another objection to the admiralty jurisdiction here is that the vessel was not engaged in interstate or foreign commerce. It was employed only to run from shore to Santa Monica bay, 5 or 10 miles to the deep-sea fishing place, and then return, and all within the jurisdiction of California. This argument is a complete misconception of what the admiralty jurisdiction is under the Constitution of the United States. Its jurisdiction is not limited to transportation of goods and passengers from one state to another, or from the United States to a foreign country, but depends upon the jurisdiction conferred in article 3, § 2, extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction."

It is true that the Admiralty Clause is couched in terms of federal *judicial* power: "The judicial Power shall extend * * * to all Cases of admiralty and maritime Jurisdiction * * *". Whether the use of the word "all" was intended to make the jurisdiction of the federal courts in "Cases of admiralty and maritime Jurisdiction" exclusive, or whether it was simply intended to invest the federal courts with jurisdiction of whatever "admiralty and maritime" cases might be brought before them, is a subject on which there has been much debate. The correct view, it is submitted, is that the Admiralty Clause itself did not make the jurisdiction of the federal courts in admiralty cases exclusive, but that the Clause, read in context with the Necessary and Proper Clause, empowered Congress to make it so. See *The Moses Taylor*, 71 U.S. 411 (1866). With respect to civil admiralty cases, Congress exercised

its power immediately; the Judiciary Act of 1789 [29] provided, in Section 9, that "the district courts * * * shall also have "*exclusive* [30] original cognizance of all civil causes of admiralty and maritime jurisdiction * * *". To make it clear, however, that "civil causes of admiralty and maritime jurisdiction" referred only to maritime cases wherein an admiralty remedy was sought, Congress followed the quoted language with the now famous "saving to suitors" clause: "saving to suitors, in all cases, the right of a common law remedy, when the common law is competent to give it * * *". The modernized version of the exclusive grant of civil admiralty jurisdiction to the district courts is now found in Title 28 U.S.C. § 1333, the pertinent part of which provides:

> "The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

2. *The power of Congress and the federal judiciary with respect to the extent of the admiralty jurisdiction and the substantive maritime law.*

Appellants suggest (Brief, p. 50) that the Admiralty Clause was intended to be nothing more than a grant of judicial power, *i.e.*, that while it gives the federal judiciary cognizance of cases of admiralty and maritime jurisdiction, it does not, by implication, vest paramount power over the substantive maritime law in the Federal Government. In so suggesting, they are in effect seeking to have this Court overrule a long line of its own decisions handed down over the past century, holding that under the Admiralty Clause, in areas which are not of purely local concern, only the Federal Government has the power to determine the

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[29] 1 STAT. 76-77.

[30] Emphasis throughout is ours.

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[31] *See also* Appellants' Brief
f, p. 54; *but see* p. 76.

The effect of the Admiralty Clause was clearly explained by this Court almost a century ago in *The Lottawanna, supra,* at pp. 574-75:

> "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction' * * * One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."

This Court has repeatedly held that the maritime law as it existed in 1789 was not to remain forever unaltered but was instead to be subject to modification by Congress "as experience or changing conditions might warrant". *Panama R.R. Co.* v. *Johnson,* 264 U.S. 375 (1924); *Crowell* v. *Benson,* 285 U.S. 22, 39 (1932); *The Thomas Barlum,* 293 U.S. 21, 23 (1934).

A typical example of such federal legislation is the Admiralty Extension Act,[32] the constitutionality whereof is questioned by Appellants, for the first time, in their Brief (pp. 52-55), contrary to Rule 40.1(d)(2). The Act provides, in pertinent part:

> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases

[32] 46 U.S.C. § 740.

> of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.
>
> In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water * * *."

The Admiralty Extension Act is a plainly valid exercise of Congress' power to "alter, qualify or supplement" the substantive maritime law "as experience or changing conditions might require". *The Thomas Barlum, supra,* p. 17. Before 1948, federal jurisdiction in most maritime tort cases was limited to torts consummated on navigable waters. This jurisdictional limitation not infrequently led to multiplicity of suits and sometimes produced disparate and highly inequitable results. For example, in a vessel-bridge collision, liability for damage to the vessel was within the admiralty jurisdiction and governed by the general maritime law, while liability for the injury to the bridge was not within the jurisdiction of the admiralty court, and was governed by state law. *Cleveland Terminal and Valley R.R. Co.* v. *Cleveland S.S. Co.,* 208 U.S. 316 (1908); *The Troy,* 208 U.S. 321 (1908); *Martin* v. *West,* 222 U.S. 191 (1911). Despite contributory negligence, the shipowner could sue in admiralty and could recover part of his damages under the more equitable maritime rule, if the bridge were found at fault. The bridge owner, however, could not sue in admiralty, and would be barred from recovery under the common law rule if both vessel and bridge were found negligent. He would also be left without a remedy against the owner or operator of the vessel, if it developed that the casualty was caused by the sole fault of a "compulsory" pilot. *Homer Ramsdell Transp. Co.* v. *Compagnie Generale,* 182 U.S. 406, 416 (1901).

Experience and changing conditions—here the advent of steam and the utilization of steel in the construction of vessels, and the resulting increase in the capability of a vessel to injure persons and property on land—accentuated this disparity and pointed to the need for supplementing the maritime law in order that it might cover not only injuries to vessels and persons on board them caused by the negligent operation of land structures, but also injuries caused by vessels to persons and property on shore. This finally led to passage of the Admiralty Extension Act, with the result that the bridge owner may now recover at least part of his damages, despite contributory fault, and if the fault is solely that of a compulsory pilot, he may recover full damages in an action *in rem*, under the rule of *The China*, 74 U.S. 53 (1868).

The Admiralty Extension Act has been held constitutional in several lower court decisions. *United States* v. *Matson Navigation Co.*, 201 F.2d 610, 614-16 (9th Cir. 1953); *American Bridge Co.* v. *The Gloria O*, 98 F. Supp. 71, 73-74 (E.D.N.Y. 1951); *Fematt* v. *City of Los Angeles*, 196 F. Supp. 89, 93 (S.D. Cal. 1961); and see *Bergren, Effects of Recent Legislation upon the Admiralty Law*, 17 Geo. Wash. L.Rev. 353 (1949); Fauver, *The Extension of Admiralty Jurisdiction to Include Amphibious Torts*, 37 Geo. L.J. 252 (1949). While this Court has not directly passed upon the constitutionality of the Act, Mr. Justice White's opinions in *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212, 222 (1969), and *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202 (1971), *rehearing den.* 404 U.S. 1064 (1971), appear to subsume its validity.

It should be noted that quite apart from the Admiralty Extension Act, some torts consummated on land are within the admiralty jurisdiction. *The Blackheath*, 195 U.S. 361 (1904); *Richardson* v. *Harmon*, 222 U.S. 96 (1911); *Foster* v. *United States*, 156 F. Supp. 421 (S.D.N.Y. 1957); and see *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318

U.S. 36 (1943); *Igneri* v. *Cie. de Transports Oceaniques*, 323 F.2d 257 (2d Cir. 1963).

Congress is of course not entitled to invoke the Admiralty Clause in an attempt to legislate on matters which are plainly non-maritime. But this is far from saying that it may not, so long as it acts within the maritime sphere, bring within the admiralty jurisdiction of the federal courts and the coverage of substantive maritime law matters which were considered outside the admiralty jurisdiction in 1789. The Admiralty Extension Act is plainly within the maritime sphere; it relates only to injuries to persons and property caused by vessels afloat on navigable waters. It is remedial legislation of the most advanced sort, and has, during the quarter century of its existence on the statute books, proven its worth in the avoidance of multiplicity of suits and the inequities it was designed to remedy. If Appellants' suggestion were followed, and the Admiralty Extension Act were declared unconstitutional, these beneficial results would immediately disappear, and the law relating to "amphibious" torts would revert to the chaotic condition it was in before 1948.

B. No state legislation in the maritime field may contravene the essential purpose of an Act of Congress.

From the rule that Congress has paramount power in the maritime field it follows, as a corollary, that state statutes are invalid if they contravene federal legislation in the field. They may not, for example, authorize civil admiralty proceedings *in rem* in the state courts, because Congress, in enacting the Judiciary Act of 1789,[33] made the jurisdiction of the federal district courts in such proceedings exclusive. *The Moses Taylor*, 71 U.S. 411 (1866). The provisions of a state arbitration statute may not be

[33] 1 STAT. 76-77.

applied in a state court proceeding to enjoin enforcement of the arbitration clause of a maritime contract on grounds of time bar; the question of time bar is governed by the Federal Arbitration Act, whereunder all issues, including the issue of timeliness, must be left to the arbitrators. *Matter of A/S J. Ludwig Mowinckels Rederi and Dow Chemical Co.*, 25 N.Y. 2d 576 (1970). In that case the New York Court of Appeals, citing *The Thomas Barlum*, 293 U.S. 21 (1934); *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239 (1942); *Romero* v. *International Terminal Co.*, 358 U.S. 354 (1959) and *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945), held that although the Federal Judiciary Act provides that suitors may pursue their remedies in the state courts, "despite this grant of concurrent jurisdiction, the state courts are bound to apply Federal law in such disputes in order to secure a single and uniform body of maritime law", and that although the saving clause permits an action under federal maritime law to be brought in a state court, "it cannot limit the substantive rights of parties, nor, it seems, can it apply its own rules of procedure if those rules would significantly affect the result of the litigation, i.e., would be outcome determinative".[34] See also, Gilmore & Black, *The Law of Admiralty* (1957), p. 43; 1 Benedict, *The Law of American Admiralty* (6th ed. by Knauth, 1940), pp. 13-15.

Even in those closely circumscribed areas in the maritime law which are purely of local concern, and wherein the states are therefore free to act in the absence of federal legislation, once the area *is* occupied by Congress, state statutes covering the area are thereupon immediately superseded. Thus, prior to 1910 there was no federal legislation relating to maritime liens for repairs, supplies and other necessaries furnished to vessels in their home ports. The matter was, however, considered of purely local concern and the state legislatures were therefore permit-

[34] 25 N.Y. 2d at 581; 307 N.Y.S. 2d at 663.

ted to enact legislation creating maritime liens on domestic vessels for necessaries furnished in their home ports. (Such liens could of course be enforced only in the federal district courts, since only those courts had power to grant admiralty type remedies, particularly the remedy of a proceeding *in rem* to enforce a maritime lien.) In 1910, however, Congress enacted a Federal Maritime Lien Act,[35] which was subsequently amended in 1920[36] and again in 1971.[37] Once Congress pre-empted the field, all state maritime lien statutes were immediately invalidated to the extent that they related to necessaries of types covered by the federal legislation. *Piedmont, etc., Coal Co.* v. *Seaboard Fisheries Co.*, 254 U.S. 1, 11 (1920); *Dampsk. Dannebrog* v. *Signal Oil & Gas Co.*, 310 U.S. 268 (1940).

In an apparent contradiction of their concession that "***Congress alone may regulate maritime commerce" (Brief, p. 22, and see p. 54), Appellants argue that "*** states already have authority to legislate in the admiralty jurisdiction" (Brief, p. 76), citing *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440 (1960) and *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955). *Wilburn* involved a claimed conflict between a state statute and the general maritime law, and will be discussed together with other decisions on that subject, *infra*, p. 30.

The clash alleged in *Huron* was between local legislation (there a city ordinance) and federal legislation. The ordinance provided penalties of $100 and up to 30 days in jail for the emission of more than a specified amount of smoke. Its application to vessels calling at Detroit was attacked, not on the basis of a conflict with the Admiralty Clause, which was apparently not briefed or argued, but solely on the ground that it was an undue burden on inter-

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[35] 36 STAT. 604.

[36] 41 STAT. 1005-06; *see* 46 U.S.C. §§ 971-75.

[37] 1971 U. S. CONG. & AD. NEWS, Vol. 1, p. 291.

state and international commerce. It was contended that the vessel concerned had been constructed and maintained in conformity with federal laws, but that it was nevertheless impossible to perform necessary boiler cleaning without the emission of smoke in excess of the maximum quantity permitted by the ordinance. A divided Court held that application of the ordinance to a vessel owner was not a violation of the Commerce Clause. Mr. Justice Stewart, writing for the majority, stated, at 362 U.S. 442, note 1:

> "***[W]e do not reach the question of the validity of the inspection sections as they might be applied to the [vessel owner], but limit our consideration solely to what is presented upon this record—the enforcement of the criminal provisions of the Code for violation of the smoke emission provisions."

The majority further noted that the sole aim of the ordinance was "*** the elimination of air pollution to protect the health and enhance the cleanliness of the local community", whereas the purpose of the federal statutes and regulations relating to boilers and propulsion and auxiliary machinery of sea-going vessels was "*** to insure the sea-going safety of vessels subject to inspection". 362 U.S., at p. 445. The Court concluded that the federal inspection laws and the ordinance did not "overlap", and that the federal laws therefore did not pre-empt the field. 362 U.S., at p. 446. The Court then stated at p. 447:

> "The scope of the privilege granted by the federal licensing scheme has been well delineated. A state may not exclude from its waters a ship operating under a federal license. *Gibbons* v. *Ogden*, 9 Wheat. 1. A state may not require a local occupation license, in addition to that federally granted, as a condition precedent to the use of its waters. *Moran* v. *New Orleans*, 112 U.S. 69. While an enrolled and licensed vessel may be required to share the costs of benefits it enjoys, *Huse* v. *Glover*, 119 U.S. 543, and to pay fair taxes imposed by its domi-

> cile, *Transportation Co.* v. *Wheeling*, 99 U.S. 273, it cannot be subjected to local license imposts exacted for the use of a navigable waterway, *Harman* v. *Chicago*, 147 U.S. 396. See also *Sinnot* v. *Davenport*, 22 How. 227".

Mr. Justice Douglas wrote a strong dissenting opinion, in which Mr. Justice Frankfurter concurred. He said, at pp. 454-55:

> "What we do today is in disregard of the doctrine long accepted and succinctly stated in the 1851 Term in *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 566, 'No State law can hinder or obstruct the free use of a license granted under an act of Congress.' The confusion and burden arising from the imposition by one State of requirements for equipment which the Federal Government has approved was emphasized in *Kelly* v. *Washington*, 302 U.S. 1 * * *, *supra*, in the passage already quoted. The requirements of Detroit may be too lax for another port. Cf. *People* v. *Cunard White Star, Ltd.*, 280 N.Y. 413. The variety of requirements for equipment which the States may provide in order to meet their air pollution needs underlines the importance of letting the Coast Guard license serve as authority for the vessel to use, in all our ports, the equipment which it certifies."

As will be shown in Point II, *infra*, pp. 33-52, the Florida Act would impose on vessels engaged in interstate and international commerce burdens even more onerous than those which the majority in *Huron* agreed the states were powerless to impose. The Act would therefore not only clash with the Admiralty Clause, but insofar as it would relate to interstate and international commerce, it would, under the reasoning of both the majority and the minority in *Huron*, be violative of the Commerce Clause as well.

C. State statutes may not contravene the general maritime law, or interfere with its proper harmony and uniformity.

Erie Railroad Co. v. *Tompkins,* 304 U.S. 64 (1938) is inapplicable to maritime causes of action. Under the doctrine of *The Lottawanna,* 88 U.S. 558 (1875) *supra,* p. 17, there is a general maritime law, which is federal, and which is applicable uniformly throughout the United States, and any state statute which is contrary to that law is invalid, just as it would be if it contravened a federal statute in the maritime field. *Southern Pacific Co.* v. *Jensen,* 244 U.S. 205 (1917); *Knickerbocker Ice Co.* v. *Stewart,* 253 U.S. 149 (1920); *Washington* v. *W. C. Dawson & Co.,* 264 U.S. 219 (1924); see *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.,* 348 U.S. 310 (1955).

The landmark *Jensen* case held that the New York State Workmen's Compensation Statute[38] could not validly be applied to the death of a longshoreman resulting from an accident on board a vessel afloat in the navigable waters of the State. In referring to state statutes in the maritime field, this Court said, at 244 U.S. 216:

> "• • • [P]lainly, we think no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself."

Noting that the work of a longshoreman in loading a vessel is maritime in nature, and that the rights and lia-

[38] C. 816, Laws 1913; *re-enacted and amended* C. 41, Laws 1914; *amended* C. 316, Laws 1914.

bilities arising from injuries sustained while engaged in such work are matters clearly within the admiralty and maritime jurisdiction of the United States, the Court continued, at pp. 217-18:

> "If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other states may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded * * *. The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed. So applied, it conflicts with the Constitution and to that extent is invalid."

The Court then stated that the remedy which the New York State Workmen's Compensation Statute purported to give was of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and therefore not "saved to suitors" from the otherwise exclusive grant of admiralty jurisdiction to the federal district courts made by Section 9 of the Judiciary Act of 1789.[39]

Evidently acting in the belief that *Jensen* was based primarily on the Court's observation that workmen's compensation was not a common law remedy saved to suitors under the Judiciary Act, Congress promptly amended that statute so as to save to suitors, not only their common law remedies, but also any "rights and remedies under the Workmen's Compensation Law of any State."[40] This amendment was, however, struck down

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[39] 1 STAT. 76-77.

[40] 40 STAT. 395.

by this Court in *Knickerb* *ocker, supra,* wherein, after referring to its earlier dec sions, including *Jensen,* the Court stated, at 253 U.S. 16)-61:

> "The Constitution i itself adopted and established, as part of the laws of the United States, approved rules of the general n aritime law and empowered Congress to legislate matters within the adm respect of them and other tion. Moreover, it too iralty and maritime jurisdic- by legislation or judk from the States all power, the essential purposes cial decision, to contravene jury to, characteristic of, or to work material in- interfere with its pro features of such law or to in its international a ber harmony and uniformity preserve adequate ha nd interstate relations. To form rules relating to mony and appropriate uni- them within control of maritime matters and bring the fundamental purp the Federal Government was Congress was empow se; and to such definite end sphere * * *. The fi red to legislate within that the Constitution itself ld was not left unoccupied; rights and liabilities adopted the rules concerning tainly these are not les applicable therein; and cer- have been if enacted s paramount than they would by Congress."

Appellants are critical o certain of the decisions of this Court on the subject of f ederal supremacy in the mari- time field. In particular, the pronouncements" which "co find fault with *Jensen* and in such fashion as to ignore ed by Appellants as "judicial (Brief, p. 49). They contend nstrue the Admiralty Clause autonomous sovereignty with state sovereignty altogether" to the Court's "continuing that these cases "establish an scope" to the Admiralty Cla in the admiralty," and refer 49-50). AIMS and the P. & endowment of power and pletely with these categori se as a "legend" (Brief, pp. the principle reiterated in *J* I. Associations disagree com- ations. They maintain that *ensen* is eminently sound and

is just as valid today as it was in 1917. While one may disagree with the finding in *Jensen* that the application of a state workmen's compensation statute to personal injury to, or death of a longshoreman working on a vessel within the territorial waters of the state is not a matter of "local concern", there should be no disagreement with the *Jensen* principle that, except in matters of purely local concern, state legislation may neither contravene an applicable federal statute nor affect the general maritime law. In any event, as the court below stated (A44):

> "The Florida Act here constitutes a far greater intrusion into the federal maritime domain than the New York statute in the *Jensen* case. If applied to the plaintiffs and intervenors in this case, the Florida Act would effect—in the words of *Jensen*—the 'destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded'."

The following are examples of the many decisions, in addition to those already cited, holding state and local legislation invalid as in conflict with the general maritime law:

Gibbons v. *Ogden*, 22 U.S. 1 (1824), invalidating a state statute purporting to give Robert Fulton and another the exclusive right to operate steamboats on the Hudson River;

Workman v. *City of New York*, 179 U.S. 552 (1900), holding that a municipal ordinance may not limit a right of recovery existing under the general maritime law;

Branch v. *Schumann*, 445 F.2d 175 (5th Cir. 1971), wherein the court struck down a Florida statute[41] purporting to change the basis of liability for a maritime tort.

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[41] FLORIDA STATUTES § 371.52 (1970).

The same principle applies to non-statutory rules of law adopted by state courts. There are many examples of judicially fashioned rules of law which have been invalidated as in conflict with rules of the general maritime law. To name but a few:

Chelentis v. *Luckenbach Steamship Co.*, 247 U.S. 372 (1918), holding that prior to passage of the Jones Act,[42] the general maritime law, and not state law, must be applied in actions for seamen's injuries, even if brought in state courts;

Garrett v. *Moore-McCormack Co.*, 317 U.S. 239 (1942), wherein this Court refused to permit application of Pennsylvania law, which placed the burden of proving the invalidity of a release on the releasor, in a Pennsylvania state court action for a seaman's injuries, and instead applied the general maritime law, whereunder one asserting a seaman's release as a defense has the burden of proving its validity;

Kossick v. *United Fruit Co.*, 365 U.S. 731 (1961), holding a state statute of frauds inapplicable to a maritime contract—here an oral guaranty allegedly given to a seaman by his employer;

Kermarec v. *Compagnie Generale*, 358 U.S. 625 (1959), applying the general maritime law, rather than the law of New York, to an injury sustained by a visitor on board a vessel in New York harbor;

Pope & Talbot, Inc. v. *Hawn*, 346 U.S. 406 (1953), holding that the general maritime law rule, whereunder contributory negligence does not bar a recovery but is only considered in mitigation of damages, must be applied in suits for maritime injuries, regardless of the forum;

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[42] 46 U.S.C. § 688.

Moragne v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), overruling *The Harrisburg*, 119 U.S. 199 (1886), and holding that apart from any state wrongful death statute, the general maritime law affords a cause of action for wrongful death;

Benazet v. *Atlantic Coastline R.R. Co.*, 442 F.2d 694 (2d Cir. 1971), aff'd *per curium*, 40 U.S.L.W. 4516 (U.S. May 15, 1972), holding that a state law may not validly be invoked to provide contribution between joint tortfeasors in maritime cases, in contravention of the general maritime law, which recognizes no such right, except in collision cases. (See *Halcyon Lines* v. *Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282 [1952]).

See, also, D. Currie, *Federalism and the Admiralty: "The Devil's own Mess"*, 1960 Sup. Ct. Rev. 158, 188, 195-96.

Even when the area is one covered neither by federal legislation nor by a previously announced rule of the general maritime law, state law will not be applied, if the area is one wherein national uniformity and harmony are desirable. Instead, this Court will fashion a rule, which will thereupon become part of the general maritime law, to be applied throughout the United States. See *Kermarec* v. *Campagnie Generale*, *supra*, p. 29; *Southern Pacific Co.* v. *Jensen*, *supra*, p. 25.

In *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955), cited by Appellants (Brief, p. 76) in support of their submission that "states already have authority to legislate in the admiralty jurisdiction", a divided Court [43] held a state statute relating to insurance warranties applicable to a policy on a small houseboat em-

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[43] Chief Justice Warren and Justices Clark, Douglas and Minton joined with Mr. Justice Black in the majority opinion; Mr. Justice Frankfurter concurred in the result, and Justices Reed and Burton dissented. At the time, the Court consisted of eight justices.

ployed on the waters of Lake Texoma, an artificial lake lying between Texas and Oklahoma. Mr. Justice Black, writing for the majority, said that the crucial questions presented were narrowed to two: (1) whether there was a judicially established federal maritime rule governing marine insurance warranties, and (2) if not, whether the Court should fashion one. He then found that there was no such judicially established rule and that there was no need for the Court to fashion one, because in his view the regulation of marine insurance policies should be left with the states.

Mr. Justice Reed, in a vigorous dissent, noted that there was a body of lower federal court decisions following the English rule of strict compliance with marine insurance warranties. He said he was "* * * inclined to think that Congress or this Court might well consider modifying the strict rule insofar as the breached warranty does not contribute to the loss." However, since the majority had concluded that the Court should not undertake the task, he found it unnecesary to do more than say that in the absence of federal amelioration he "would follow the established rule of holding the insured to his warranty." 348 U.S., at 326-27.

Wilburn has been much criticized and seldom followed, and its validity today is open to question.[44] Its true significance can, it is submitted, best be gathered from Mr. Justice Frankfurter's concurring opinion. He said that the "question, and the only question * * * to be decided [was] whether the demands of uniformity relevant to maritime law require that marine insurance on a houseboat yacht brought to Lake Texoma for private recreation should be subject to the same rules of law as marine insurance on a houseboat yacht 'confined', after arrival, to the waters of Lake Tahoe or Lake Champlain." In his

[44] *See, e.g.*, D. Currie, *Federalism and the Admiralty: "The Devil's own Mess"*, 1960 SUPREME CT. REV. 158, 210, 215-220.

view, the answer to this question was that "the interests concerned with shipping in its national and international aspects are substantially unconcerned with the rules of law to be applied to such limited situations", and he joined "in a result restricted within this compass." 348 U.S., at p. 322.

Mr. Justice Frankfurter then stated, at p. 323:

> "Unfortunately, for reasons that I do not appreciate, the Court's opinion goes beyond the needs of the problem before it. Unless I wholly misconceive that opinion, its language would be invoked when cases so decisively different in degree as to be different in kind come before this Court. It seems directed with equal force to ocean-going vessels in international maritime trade, as well as coastal, intercoastal and river commerce. Is it to be assumed that were the Queen Mary, on a world pleasure cruise, to touch at New York City, New Orleans and Galveston, a Lloyds policy covering the voyage would be subjected to the varying insurance laws of New York, Louisiana and Texas? * * * It cannot be that by this decision the Court means suddenly to jettison the whole past of the admiralty provision of Article III and to renounce requirements for nationwide maritime uniformity, except insofar as Congress has specifically enacted them, in the field of marine insurance.
>
> It is appropriate to recall that the preponderant body of maritime law comes from this Court and not from Congress. Judicial enforcement of nationwide rules regarding marine insurance is, as my brother REED cogently shows, deeply rooted in history. What reason is there for abruptly turning over, pending action by Congress, to the crazy-quilt regulation of the different States what so long has been the business of the courts?"

It is submitted that the only possible way in which the majority opinion in *Wilburn* can be reconciled with the long line of decisions of this Court, commencing with *The*

Lottawanna, 88 U.S. 558 (1875) and continuing through *Moragne* v. *States Marine Lines, Inc.,* 398 U.S. 375 (1970) is that suggested in Mr. Justice Frankfurter's concurring opinion, *i.e.,* that insurance on a small houseboat restricted to an artificial lake located between two states might be treated as falling within the "local concern" exception to the rule that in the absence of Congressional legislation state legislatures are powerless to act in the maritime area.

The sweeping provisions of the Florida Act would apply alike to the largest foreign flag tanker calling at Tampa and the smallest domestic oil barge employed on a Florida inland waterway. They could certainly not be considered in the same category as the Texas statute on insurance warranties applied to the Lake Texoma houseboat in *Wilburn.*

POINT II

The Florida Act contravenes essential purposes expressed by acts of Congress and international conventions; it is contrary to the general maritime law and interferes with its proper harmony and uniformity.

A. The Florida Act conflicts with federal legislation and international conventions.

1. *Federal water pollution legislation.*

Congress has been providing by statute for the prevention and minimization of water pollution since 1886. The federal statutes in this area, which supplement and to some extent alter the general maritime law, include, in chronological order:

1. The New York Harbor Act of 1886;[45]

[45] 24 STAT. 329.

2. The Obstruction Act of 1890;[46]
3. The Refuse Act of 1899;[47]
4. The Oil Pollution Act of 1924[48] (superseded by the Water Quality Improvement Act of 1970);
5. The Water Pollution Control Compact Act;[49]
6. The Federal Water Pollution Control Act;[50]
7. The Act to Implement the Provisions of the International Convention for the Prevention of the Pollution of the Sea by Oil;[51]
8. The Clean Waters Restoration Act of 1966[52] (superseded by the Water Quality Improvement Act of 1970);
9. The Water Quality Improvement Act of 1970[53] (hereinafter "W.Q.I.A.").
10. The Ports and Waterways Safety and Environmental Quality Act of 1972.[54]

The New York Harbor Act, *supra*, is still in effect, and prohibits the discharge of matter of any kind, other than that flowing from streets and sewers, into the waters of the harbors of New York, Hampton Roads and Baltimore.

The policy implicit in the New York Harbor Act was given national application in the Refuse Act of 1899, *supra*,

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[46] 26 STAT. 453, *as amended* 28 STAT. 363.
[47] 33 U.S.C. § 407.
[48] 33 U.S.C. §§ 431-37 (1964).
[49] 61 STAT. 682.
[50] 33 U.S.C. §§ 1151-60.
[51] 33 U.S.C. §§ 1001-15.
[52] 80 STAT. 1252.
[53] 33 U.S.C. §§ 1161-75.
[54] Pub. L. No. 92-340 (July 10, 1972).

which is still in effect and which is now proving to be a most successful vehicle for the Federal Government's efforts to clean up the nation's waters.[55] Although it was passed well before petroleum and its derivatives became cargoes routinely carried by sea in bulk, and therefore omits mention of them, this Court has held that the statute may properly be invoked to punish the discharge of petroleum products. *United States* v. *Standard Oil Co.*, 384 U.S. 224 (1966). See also, *La Merced*, 84 F. 2d 444 (9th Cir. 1936) and *United States* v. *Esso Standard Oil Co.*, 375 F. 2d 621 (3rd Cir. 1967). Other materials the discharge of which has been held to fall within the ban of the 1899 Act include dunnage, *United States* v. *The Helen*, 164 F. 2d 111 (2d Cir. 1947); garbage, *The Mormacsaga*, 204 F. Supp. 701 (E.D. Pa. 1962); sourmash, *Maier* v. *Publicker Commercial Alcohol Co.*, 62 F. Supp. 161 (E.D. Pa. 1945), aff'd *per curiam*, 154 F. 2d 1020 (3d Cir. 1946); and see *United States* v. *Florida Power and Light Company*, 311 F. Supp. 1391 (S.D. Fla. 1970), relating to thermal pollution by heated water.

Water pollution by discharges of oil was first made the specific subject of legislation in the Oil Pollution Act of 1924, *supra*, which made it unlawful to discharge oil into the navigable waters of the United States, "except in case of emergency imperiling life or property or unavoidable accident, collision, or stranding ***."[56] The Clean Waters Restoration Act of 1966, *supra*, amended the 1924 Act, but did not affect the 1899 Act. Among other things it made the shipowner responsible for removal—or the payment of the Government's removal costs—but only if the

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[55] S. Kashiwa, *The Refuse Act and Protection of Water Quality*, 9 HOUST. L. REV. 676 (1972). The author is Assistant Attorney General, Land and Natural Resources Division, Department of Justice.

[56] 33 U.S.C. § 433 (1964).

discharge of oil from his vessel was caused wilfully or by gross negligence.

The 1924 Act, as amended in 1966, was supplanted in 1970 by W.Q.I.A., which contains detailed provisions for the control of pollution by oil, whether discharged from vessels or from on shore or off shore installations, for liability for cleanup costs, and for promulgation of regulations by the President concerning abatement of pollution by other "hazardous polluting substances".[57]

W.Q.I.A. declares that

> "• • • [I]t is the policy of the United States that there should be no discharges of oil into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone."[58]

The Florida Act, which came into force after the effective date of W.Q.I.A., would, if held valid, contravene some and duplicate other provisions of that statute (see the comparative table annexed hereto as Table A illustrating the principal provisions of the Florida Act which contravene or duplicate those of federal statutes, international conventions, and rules of the general maritime law). For example, if the vessel owner or operator fails to clean up an oil discharge, W.Q.I.A. requires the Federal Government to do so, and the Government may then recover the costs, unless the owner or operator proves that the discharge was the result of an act of God, an act of war, the Government's negligence, or the act or omission of a third party. Liability is limited to a sum equal to $100 multiplied by the vessel's gross tonnage, or $14 million, whichever is the lesser, unless the discharge was caused by a willful

[57] 33 U.S.C. § 1162(a).

[58] 33 U.S.C. § 1161(b)(1).

act or willful negligence of the owner or operator, in which case the liability is unlimited.[59]

The Florida Act, on the other hand, would appear to contemplate cleanup operations by the State if the vessel owner or operator failed to undertake them, and the owner or operator would then be absolutely liable, without limitation.[60]

Bills amending W.Q.I.A. in numerous respects, including the extension of its liability provisions to other "hazardous polluting substances" besides oil, have been passed by both Houses of Congress and referred to a House-Senate Conference for the purpose of reconciling differences. See Brief *Amicus* of The Maritime Law Association of the United States, in support of affirmance, note 16, p. 8. Meanwhile, on July 10, 1972 the President approved the Ports and Waterways Safety and Environmental Quality Act,[61] one purpose whereof is the protection of navigable waters from environmental harm. It contains elaborate provisions with respect to the construction, alteration and repair of vessels carrying oil and other "hazardous polluting substances", and with respect to the movement of vessels in areas determined to be hazardous under conditions such as reduced visibility, adverse weather, or congestion. As shown in Table A, the Florida Act squarely conflicts with these provisions.

The Florida Act requires consideration in relation not only to the substantial body of federal legislation concerning water pollution, but also to four international conventions in the same area. The first is the International Convention for the Prevention of Pollution of the Sea by Oil,[62] ratified by the United States in 1961 and implemented

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[59] 33 U.S.C. § 1161(f)(1).

[60] FLORIDA STATUTES §§ 376.11, 376.12 (1970).

[61] Pub. L. No. 92-340 (1972).

[62] TIAS 4900, 12 UST 2989, 327 UNTS 3.

by the Oil Pollution Act of that year.[63] Amendments adopted in 1962 were ratified by the United States,[64] and the 1961 Oil Pollution Act was correspondingly amended in 1966.[65] Further amendments to the Convention, made on the recommendation of the Intergovernmental Maritime Consultative Organization (hereinafter "IMCO"), an affiliate of the United Nations, were ratified by the Senate on September 20, 1971, on the recommendation of the President.[66] When the new amendments come into force, they will completely prohibit the voluntary discharge of oil or oily mixtures from vessels, save in relatively minute quantities and under tightly controlled conditions.[67]

The second is the "Intervention Convention," signed November 29, 1969, and ratified by the Senate September 20, 1971.[68] When it enters into force, this Convention will confirm the right of the signatories to take such reasonable steps as they may deem necessary to minimize pollution damage to their coasts and coastal waters, following a casualty.

At the same time (November 29, 1969) the third Convention—on Civil Liability for Oil Pollution[69]—was signed. When it becomes effective, it will regulate liability to governments for cleanup costs and liability to both governments and private interests for damages resulting from discharges of oil cargoes. Ratification of this Con-

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[63] 75 STAT. 402.

[64] February 25, 1964.

[65] 80 STAT. 372.

[66] 117 CONG. REC. S14606-8 (daily ed. Sept. 20, 1971).

[67] New Article III, as found in IMCO Resolution A.175(VI), adopted 21 October 1969 (*Amendments to the International Convention for the Prevention of Pollution of the Sea by Oil, 1954*), at Executive G, 91st Cong., 2nd Sess. pp. 30-31.

[68] 117 CONG. REC. S14606-8 (daily ed. Sept. 20, 1971) *see note 5 supra.*

[69] Executive G, 91st Cong., 2nd Sess.

vention was also requested by the President,[70] but the Senate Foreign Relations Committee recommended that it be held in abeyance, pending formulation of the fourth, the so-called "Fund" Convention, then under consideration by IMCO.[71] That Convention [72] was signed December 18, 1971, and the President recommended ratification May 5, 1972.[73] Under these circumstances, it does not appear unreasonable to assume that both the Civil Liability Convention and the "Fund" Convention will soon be ratified.

The Civil Liability Convention will make the vessel owner liable for pollution damages (including the cost of preventive measures) resulting from a discharge of oil, unless he can prove that the discharge was a result of hostilities, "a natural phenomenon of an exceptional, inevitable and irresistible character",[74] governmental negligence in the maintenance of navigational aids, or acts or omissions of third parties "with intent to cause damage".[75] If the discharge is not the result of the owner's "actual fault or privity" he will be entitled to limit the amount of his liability to 2,000 "Poincaré" gold francs [76] (about $146 at the new rate) per ton of the vessel's adjusted net tonnage, subject to a ceiling of 210 million gold francs (about

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[70] *Id.*, p. (1).

[71] *Senate Foreign Relations Committee, Executive Report No. 92-9, "1969 Oil Pollution Conventions and Amendments", August 5, 1971, 92nd Cong., 1st Sess.*

[72] International Convention on the Establishment of an International Fund For Compensation For Oil Pollution Damage, Executive K, 92nd Cong., 2nd Sess.

[73] *Id.*, pp. (III), (IV).

[74] It is understood that this phraseology was insisted upon by the U.S.S.R. delegation instead of the more traditional "act of God".

[75] 1969 Civil Liability Convention, Article III, § 2.

[76] 1969 Civil Liability Convention, Article V, § 1. The "Poincaré" franc is a unit of 65.5 milligrams of gold of millesimal fineness 900. *Id.*, V(9).

$15.4 million).[77] The Convention will require insurance or other satisfactory evidence of financial responsibility to meet the liabilities it will impose.[78]

The "Fund" Convention is designed to set up an international fund, financed by contributions from receivers of substantial quantities of oil, to meet claims for pollution damages to the extent that they are not recoverable under the Civil Liability Convention. The maximum amount recoverable, including amounts paid under the Civil Liability Convention, would be approximately $32.5 million per incident.[79]

2. *Federal Legislation and International Agreements Concerning Construction and Inspection of Vessels and Licensing of Personnel.*

Congress has established a comprehensive regulatory system, administered by the United States Coast Guard, governing the construction and inspection of powered vessels employed on navigable waters of the United States.[80] The federal legislation is in consonance with the International Convention for the Safety of Life at Sea,[81] commonly known as "SOLAS", which has been ratified or adhered to by all maritime nations, including the United States.

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[77] *Id.*, V, § 1.

[78] 1969 Civil Liability Convention, Article VII. The Convention is analyzed in Healy, *The International Convention on Civil Liability For Oil Pollution Damage*, 1969, 1 J. MAR. L. & COMM. 317 (1970). For a comparison of W.Q.I.A. with the 1969 Civil Liability Convention, *see* Healy and Paulsen, *Marine Oil Pollution and the Water Quality Improvement Act of 1970*, 1 J. MAR. L. & COMM. 537 (1970).

[79] 1971 Convention on an International Fund For Compensation of Oil Pollution Damage, Article 4, § 4(a). This amount may be doubled by subsequent agreement of the Contracting States. Article 4, § 6.

[80] 46 U.S.C. §§ 361-436; 46 C.F.R. §§ 1-199.

[81] TIAS 5780, 16 UST 185, 536 UNTS 27 (1965).

The Florida Act, if valid, would require vessels transporting "pollutants" to maintain on board containment gear approved by the State's Department of Natural Resources, "with a crew trained in the use of such gear"; would authorize a State-appointed port manager "to board any vessel prior to its entry into port in order to ascertain [its] seaworthiness * * * and the presence of required containment gear," and would empower state officials to establish "requirements for minimum weather and sea conditions for permitting a vessel to enter port and for the safety and operations of vessels * * *."[82] The Act would thus give state officials and employees powers already delegated by Congress to the Coast Guard under the federal legislation relating to vessel construction and inspection in force when the Florida legislation became effective. As shown at p. 37, above, it is also in conflict with the provisions of the Ports and Waterways Safety Act of 1972[83] relating to construction, repair and inspection, and to the Coast Guard's authority to direct the movement of vessels in hazardous areas.

It is not only unconstitutional but totally impractical for Florida—or any other State—to set up its own vessel equipment and inspection requirements for vessels trading to the State, in addition to the elaborate system devised by the United States Government in cooperation with other maritime nations. If the people of Florida think that the existing federal legislation in this field requires change in any respect they are of course free to press for such change through their representatives and senators in Washington; any such dissatisfaction should not take the form of ill-conceived, if well-intentioned, state legislation.

It is also manifestly improper and impractical for a state employee—whether or not properly qualified—to sub-

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[82] Florida Statutes § 376.7(2)(a), (c) and (g) (1970).

[83] Pub. L. No. 92-340.

stitute his judgment concerning the effect of weather and sea conditions on a particular vessel for that of a master duly licensed by the United States or other national government, or of a properly authorized Coast Guard officer. Nor is it proper for state employees to determine whether the crew of a vessel calling at one of its ports is adequate in number or properly trained in the use of the vessel's equipment. In the case of United States flag vessels, such problems must be dealt with by the Coast Guard, which has charge of licensing and manning requirements.[84]

As to foreign flag vessels, the Convention Concerning the Minimum Requirement of Professional Capacity for Masters and Officers on Board Merchant Ships,[85] adopted at the 1936 International Labor Conference and ratified by the United States, would, by implication at least, require recognition of valid licenses held by masters and officers of vessels of signatory nations calling at United States ports. The Florida Act, insofar as it would empower state employees to pass upon the qualifications of masters and officers, would therefore be in conflict with this Convention, as well as with federal manning legislation.

3. *The United States Limited Liability Act.*

Under the Limited Liability Act,[86] where there are no death or injury claims, the liability of a vessel owner or demise charterer for property damage is limited to the value of the vessel at the end of the voyage, plus the "freight then pending", if he can show that the damage was not caused with his "privity or knowledge".

Appellants are in error in asserting (Brief, p. 65) that there is a conflict between the Limited Liability Act and

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[84] 46 U.S.C. §§ 221-49c; 46 C.F.R. §§ 10.01-10.15.

[85] USTS, No. 950; 6A BENEDICT ON ADMIRALTY 989 (7th ed. rev., by Knauth).

[86] 46 U.S.C. §§ 183-89.

W.Q.I.A. As indicated above, at pp. 36-37, that statute changed the law of limitation in respect of United States Government claims for the cost of cleaning up an oil spill, by requiring a separate "limitation fund" of $100 per gross ton of the vessel's tonnage (with a ceiling of $14 million), to be available exclusively for payment of such claims.[87]

What Congress could do, however, the states are powerless to do; no state statute is valid if it contravenes the Limited Liability Act. *Butler* v. *Boston & Savannah Steamship Co.*, 130 U.S. 527 (1889); *Flink* v. *Paladini*, 279 U.S. 59 (1929); *Loughlin* v. *McCaulley*, 186 Pa. St. 517, 40 Atl. 1020 (S.Ct. Pa. 1898).

Appellants concede that the Limited Liability Act "cannot co-exist in the same courtroom with the Florida Act" (Brief, p. 64), and that it would, "assuming continued vitality of *Richardson* v. *Harmon* [222 U.S. 96 (1911)] and 46 U.S.C. § 189, clash head-on with absolute and unlimited liability aspects of the Florida Act." (Brief, p. 65).[88] They therefore urge that *Richardson* be overruled, and that the Limited Liability Act be declared unconstitutional on "due process" grounds, insofar as it applies to claims of parties not in contractual relationship with the shipowner (Brief, pp. 65-69).

Long before adoption of the Admiralty Extension Act[89] *Richardson* had held the Limited Liability Act, as amended by the addition of 46 U.S.C. § 189 (Appellants' Brief, p. 3), properly applicable to damage caused by vessels to shore-

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[87] 33 U.S.C. § 1161(f)(1).

[88] *cf.* Brief Amicus of Commonwealth of Massachusetts, at p. 10: "Massachusetts does not challenge the Limitation of Liability Act (46 U.S.C. §§ 181-189) and concedes that a shipowner sued *in personam* for oil pollution damages could limit his liability under that Act."

[89] 46 U.S.C. § 740.

ince been applied on innumerable
d other third party tort claims of
side property. It
occasions to collis
every conceivable t the Limited Liability Act has no

It should be no n the shipowners' own fault, but
effect on claims b ly on fault of the master or crew
only on those base side employees. Even as to such
or non-managerial except in the more unusual cases
claims it has no han the "limitation fund". While
where they total m er's limitation of liability in prop-
the basis of the shi value of the vessel and the voyage
erty damage cases- e, the concept of limitation is by
earnings—may be shipping. The business corpora-
no means restricte nization, and ceilings on recoveries
tion, bankruptcy, r all forms of limitation of liability.
for wrongful death rt has never held a federal statute

Apparently this ion unconstitutional on "due proc-
of nation-wide app event the constitutionality of the
ess" grounds.[90] In has been settled since *Butler* and
Limited Liability lows that since the two pieces of
Richardson, and it annot coexist, it is the Florida Act,
legislation admitted tute, which must fall.
and not the federal

Statute.

4. *The Federal Wr*

The Federal Wr Statute, which is part of the Rivers
and Harbors Act,[91] kes it unlawful to permit or cause
vessels to be sunk, untarily or carelessly, in navigable
channels. If a vess is so wrecked and sunk, the owner
must mark it and im ediately undertake its removal. Fail-

[90] "In fact, it does t appear that the Court has up to this time ever held an act C Congress unconstitutional on this ground [the Due Process clause f the Fifth Amendment]" CONSTITUTION OF THE U.S.A. ANNOTED, S. Doc. No. 39, p. 973, 88th Cong., 1st Sess. (N. Small ed., 964).

[91] 33 U.S.C. §§ 409-

ure to do so is considered an abandonment, subjecting the wreck to removal by the United States.

The Florida Act would make it unlawful to leave a vessel in a wrecked, junked or substantially dismantled condition or abandoned on the waters of the State, without the consent of the State's Department of Natural Resources, and would empower the Department to remove any derelict vessel if it obstructed or threatened to obstruct navigation, to contribute to water pollution, or otherwise to endanger the environment.[92] While it is stated that this provision "is not intended to be in contravention of any applicable federal act" it is in fact in contravention of the Federal Wreck Statute, *supra*, which gives the owner the option to either remove the wreck or abandon it to the United States, subject to the rule of *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967), whereunder the owner may be held liable for removal costs if the vessel was wrecked as a result of his fault. The Florida Act is thus plainly in contravention of the Federal Wreck Statute. *The Central States*, 9 F. Supp. 934 (E.D.N.Y. 1935); *Petition of Highlands Nav. Corp. (The Grand Republic—The Nassau)*, 29 F.2d 37 (2d Cir. 1928); *City of Newark* v. *Mills (The South Shore)*, 35 F.2d 110 (3d Cir. 1929).

5. *The Admiralty Grant of the Judicial Code.*

The Florida Act would make a shipowner absolutely liable to the State for the cost of cleaning up a discharge of oil or other "pollutant", regardless of the cause. If the owner claimed that the discharge was caused by an act of God, war, government or a third party, he could then ask for a hearing before the State's Department of Natural Resources. If the Department found the owner's contention correct, it could then, in its discretion, waive reimbursement, but "The findings of the department

[92] FLORIDA STATUTES § 376.15 (1970).

[would] be conclusive as it is the legislative intent that waiver provided in this act is a privilege conferred, not a right granted." [93]

This provision is squarely in conflict with the statutory implementation of the Admiralty Clause, now found in § 1333 of 28 U.S.C., the Judicial Code, granting to the federal district courts exclusive original jurisdiction of "Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled". The party seeking relief in a maritime case always has the right to invoke the admiralty jurisdiction of a federal district court, and no statute purporting to give exclusive jurisdiction to another tribunal is valid. Here, the party seeking relief would be the shipowner determined to be liable for the discharge. If the Florida Act were otherwise constitutional (and it is not), the provision purporting to vest in a department of the State exclusive jurisdiction to hear and decide the issue whether or not a discharge was the result of one of the four causes named would be invalid. See *Panama R. R. Co.* v. *Johnson*, 264 U.S. 375 (1924); Gilmore & Black, *The Law of Admiralty* (1957), p. 286.

B. The Florida Act is contrary to and interferes with the proper harmony and uniformity of the general maritime law.

The rules of the general maritime law are of course inapplicable to waters wholly within the State of Florida and having no navigable outlet to the sea or to any other state; no land-locked lake without such a navigable outlet is within the admiralty jurisdiction. All other waters of the State of Florida are, however, within that jurisdiction, and liability for pollution of such waters is therefore governed by the general maritime law, as modified by federal

[93] FLORIDA STATUTES § 376.11(6)(c) (1970).

legislation. The Florida Act purports to legislate with respect to *all* waters of the State, including those within the admiralty jurisdiction.

Fault is the basis of martime tort liability for property claims. *The Clara,* 102 U.S. 200 (1880); *The Jumna,* 149 Fed. 171 (2d Cir. 1906). This principle is of course applicable to the maritime tort of marine pollution damage. *Fireman's Fund Ins. Co.* v. *Standard Oil Co.,* 339 F.2d 148 (9th Cir. 1964); *In re New Jersey Barging Corp.,* 168 F. Supp. 925 (S.D.N.Y. 1958); *State of California* v. *The Bournemouth,* 307 F. Supp. 922 (C.D. Cal. 1969); and see *Salaky* v. *Atlas Barge No. 3,* 208 F.2d 174 (2d Cir. 1953); Sweeney, *Oil Pollution of the Oceans,* 37 Ford. L. Rev. 155, 168-81 (1968). See also, Table A annexed hereto.

The Florida Act, if valid, would plainly make absolute the shipowner's liability to the State for damages and clean-up costs,[94] and, on Appellants' interpretation, at least, it would also impose absolute liability for damages sustained by private interests (see Appellants' Brief, pp. 42-44).

These Appellees may consider the absolute (and unlimited) liability features of the Florida Act unduly burdensome, grossly unfair, and utterly impractical. But these are *not* the grounds on which their complaint rests; the objection is that the Act, if valid, would establish a basis of liability to the State, and possibly to private interests, in conflict with the basis of liability under the general maritime law, and the extent of such liability would differ from that specified under the Limited Liability Act.

Even if there were no rule of the general maritime law establishing the basis of liability for damage caused by vessels, including pollution damage, the Florida Act would nevertheless be invalid, as the area is one wherein national uniformity and harmony is essential. It would therefore

[94] FLORIDA STATUTES § 376.12 (1970).

be necessary for this Court to fashion a uniform rule to apply throughout the United States, rather than for the individual state legislatures to fashion their own rules.

This is *not* a matter of purely local concern. In the case of the TORREY CANYON, the most devastating oil spill on record, the pollution damage was to the territorial waters and coasts of the United Kingdom, France and the Island of Guernsey. It is hoped that no such catastrophic spill will again occur, but such a casualty could result in the pollution of the waters of both Florida and Georgia (or Alabama), and their respective coasts. It would be unthinkable to have one standard of liability for the damage to Florida's waters and coast and another standard for the damage to the waters and coast of Georgia or Alabama.

Appellants rely on *Cooley* v. *Board of Wardens*, 53 U.S. 299 (1851) (Brief, p. 13) as justification for the "mechanics" of the Florida Act (its financial responsibility provisions, containment gear requirements, and provisions for determination of sea conditions for entry and unloading, and for boarding and inspection). But *Cooley* dealt with an Act of Congress of 1789 which declared that "• • • all pilots in the bays, inlets, rivers, harbors and ports of the United States shall continue to be regulated in conformity with the existing laws of the states, respectively, wherein such pilots may be, or with such laws as the states may hereafter enact for the purpose, until further legislative provision shall be made by Congress." (53 U.S., at 317). This Court found that there was no subsequent Congressional legislation and, accordingly held valid the Pennsylvania pilotage law of 1803 then being challenged. The Court said:

> "Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws

for the regulation of pilots and pilotage is plain. The act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the states; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits."

The all-inclusive provisions of the Florida Act and the wide effect of "a maritime disaster of *Torrey Canyon* proportions" to which Appellants say the Florida Act is addressed (Brief, p. 33) are a far cry from the "maritime but local" nature of the Pennsylvania pilotage law held valid in *Cooley.*

C. The Florida Act does not fall within the scope of the "Police Power".

Appellants argue (Brief, pp. 41-51) that the Florida Act is a valid exercise of the State's "police power". The term is at best a vague concept. It is quite true that it permits enactment of state legislation of a purely local nature involving maritime matters. For example, in *Kelly* v. *Washington,* 302 U.S. 1 (1937), it was held that a state may subject domestic tugs primarily engaged in work in and about the harbors where they are stationed to hull and machinery inspections to assure safety and seaworthiness, provided "* * * these tugs respectively do not carry freight or passengers for hire, or do not have on board any inflammable or combustible liquid cargo in bulk, or do not transport explosives or like dangerous cargo, or are not seagoing vessels of three hundred gross tons or over, or, with respect to requirements as to load lines, are under one hundred and fifty gross tons * * *". (302 U.S., at 8). But the Court made it quite clear that even in regard to

this very limited class of vessels, if "* * * the State goes further and attempts to impose particular standards as to structure, design, equipment and operation which in the judgment of its authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule". (302 U.S., at 15). In any event, *Kelly* is inapposite, in view of the enactment, on July 10, 1972, of the Ports and Waterways Safety and Environmental Quality Act.

In *Huron Portland Cement Company* v. *City of Detroit*, 362 U.S. 440 (1960), discussed above, at pp. 22-24, this Court held it was a valid exercise of the police power for the City of Detroit to apply the limited penal sanctions of its Smoke Abatement Code to the owner of an offending vessel berthed at Detroit. But in the words of the court in *American Airlines, Inc.* v. *Town of Hempstead*, 272 F. Supp. 226, 234 (E.D.N.Y. 1967), the *Huron* case "makes plain that the ordinance in question to be valid must be not only rooted in a proper and real local police power interest, but it must also be free of direct regulation of commerce, it must not burden commerce, and it must not operate in a field fully occupied by federal legislation." It can scarcely be said that the Florida Act meets any of these tests.

It is also true that in the absence of Congressional legislation the states have a limited right to regulate fishing in local waters. *Manchester* v. *Massachusetts*, 139 U.S. 240 (1891); *Lawton* v. *Steele*, 152 U.S. 133 (1894); *Lee* v. *New Jersey*, 207 U.S. 67 (1907); *Skiriotes* v. *Florida*, 313 U.S. 69 (1941); *C. J. Hendry Co.* v. *Moore*, 318 U.S. 133 (1943). But the states may not, under the guise of the "police power", alter, modify or in any manner whatever affect the substantive maritime law in matters not of purely local concern. If the rule were otherwise, it

could only lead to a proliferation of state statutes imposing a spate of conflicting and confusing obligations. By way of example, annexed as Table B is a comparison of some of the existing state statutes relating to water pollution. The states selected are those which have served briefs *Amici* in support of reversal, plus Alabama, because it adjoins Florida, and Alaska, because of its rather drastic provisions.

D. The Florida Act cannot be justified on Appellants' "gap" theory or their interpretation of W.Q.I.A. § 1161(o.)

The court below correctly dismissed Appellants' argument that W.Q.I.A. "left intentional loopholes or 'gaps' to be filled in by state legislation in order to accomplish congressional intent." (Brief, p. 83). As stated in Judge Tjoflat's opinion: "This theory presupposes that maritime law is an incomplete system, with numerous gaps that can be filled by state statutes. This is to say, if the maritime law affords no remedy, the states may provide one. The Supreme Court's recent decision in *Moragne* v. *States Marine Lines, Inc.* [*supra,* p. 30], clearly puts such a theory to rest." (A44).

Appellants also argue that state legislation such as the Florida Act is justified by § 1161(o) of W.Q.I.A.: "Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State." It is elementary, however, that Congress cannot give to the States powers which they have surrendered to the Federal Government under the Constitution. *Knickerbocker Ice Co.* v. *Stewart,* 253 U.S. 149 (1920), *supra,* p. 25. Among the most important of these are the paramount power of Congress to legislate in the maritime field and the power of the federal judiciary to define the general maritime law which

is to prevail throughout all of the United States. As stated by the court below: "The statement that Congress did not intend to preclude state imposed liability for oil pollution simply means that states are free to enforce pollution control measures that are within their constitutional prerogative." (A46).

Conclusion

Florida is but one of many states bordering upon, or having navigable outlets to the sea. A number of these have already enacted water pollution statutes vitally affecting vessels of many flags engaged in international, interstate and intrastate commerce. These laws are by no means uniform, and their enforcement would lead to chaotic results. Still more American shipowners would surely be added to the growing list of those who have been obligated to discontinue operations in recent years, and many foreign owners would reluctantly find it necessary to stop trading their vessels to United States ports. The American public would be bound to suffer, as the end result would be shortages of oil and other products which depend on water transportation, and higher prices for such as might still be carried.

No responsible individual or company wants to see the marine environment spoiled. Every reasonable effort should be made to keep pollution damage at a minimum, but legislation, even on the national level, which imposes liabilities which cannot be insured against is not going to lessen the number of accidental discharges in the transportation of oil and other products which have come to be regarded as necessities of modern life, any more than high jury verdicts have lessened the number of automobile accidents. What will help will be improvements in the design of vessels and in the training of the officers

and crews who man them, and improvements in the methods employed by governmental authorities, by the oil and chemical companies, and by vessel operators in coping with accidental discharges.

Insofar as foreign-going ships are concerned, it is plain that the regulation of liability for pollution should be international in scope, and great progress has already been achieved in the movement to bring this about. Meanwhile, such regulation should remain with the Federal Government, which should also be left with the exclusive right to regulate pollution by vessels engaged in the domestic trades. To permit the states to enter the field would set the movement for international uniformity back many years, without any improvement whatever in the marine environment.

The decision below should be affirmed.

Respectfully submitted,

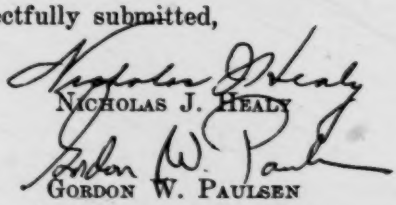

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TABLE A

PROVISIONS OF FLORIDA GENERAL MARITIME ACT DUPLICATING AND CONTRAVENING INTERNATIONAL LAW, FEDERAL STATUTES AND INTERNATIONAL CONVENTIONS

PROVISIONS	FLORIDA ACT	FEDERAL LAW AND INTERNATIONAL AGREEMENTS
Prohibited discharges.	Oil, g ammo other als. [4].	soline, pesticides, , chlorine and azardous materi- 376.3(7); 376.-	Oil [W.Q.I.A., 33 U.S.C. §1161(a)(1)(b)(1)], except as permitted under Convention for Prevention of Pollution of the Sea by Oil, as amended, (Art. III); other hazardous polluting substances specified by the President [33 U.S.C. § 1162(a)]; refuse matter of any kind [33 U.S.C. § 407].
Basis of liability for government cleanup costs.	Absol (b), (376.12.	[§§ 376.11(5) ; 376.11(6)(a);	Strict liability, excepting only act of God, act of war, negligence of U.S. Government, or act or omission of a third party. [W.Q.I.A., 33 U.S.C. § 1161(f)(1)].
Limit of liability for government cleanup costs.	No li	. [§ 376.12].	Lesser of $100 per gross registered ton or $14 million, in absence of willful negligence or willful act within owners' privity or knowledge. [W.Q.I.A., 33 U.S.C. § 1161(f)(1)].

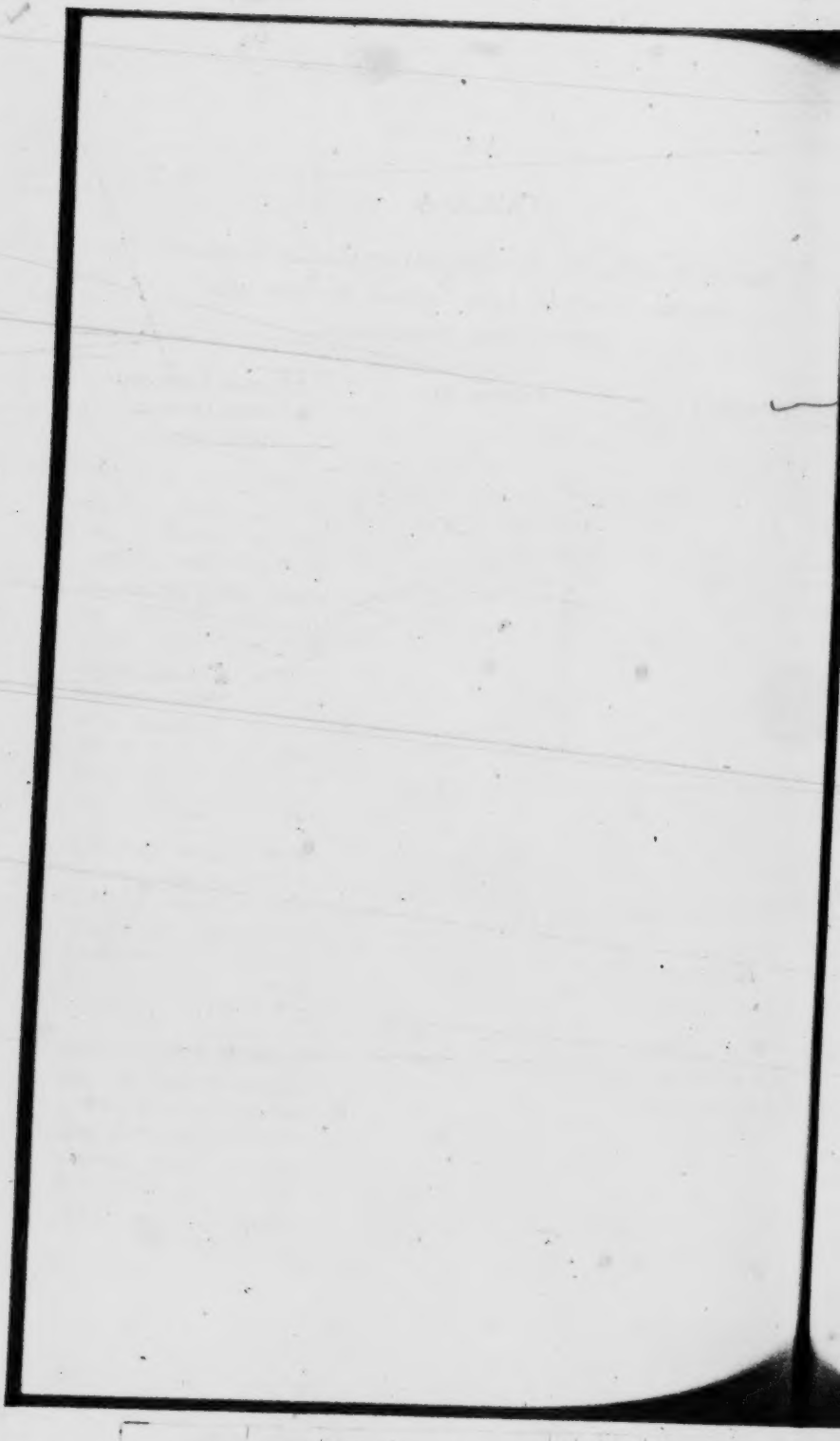

TABLE A (Continued)

PROVISIONS	FLORIDA ACT	FEDERAL LAW AND INTERNATIONAL AGREEMENTS
Basis of liability for pollution damages (other than government cleanup costs).	Absolute. [See § 376.12; see Appellant's Brief, pp. 32-41].	Fault. [General maritime law; see *Fireman's Fund Ins. Co.* v. *Standard Oil Co.*, 339 F.2d 148 (9th Cir. 1964); *In re New Jersey Barging Corp.*, 168 F.Supp. 925 (S.D. N.Y. 1958); *The Clara*, 102 U.S. 200 (1880)]. (When Convention on Civil Liability for Oil Pollution Damage takes effect basis will become strict liability).
Limit of liability for pollution damages (other than government cleanup costs).	No limit. [See § 376.12 and Appellant's Brief, pp. 11, 63-69].	Value of vessel and "pending freight", in absence of privity or knowledge. [46 U.S.C. §§ 183-89]. (When Convention on Civil Liability for Oil Pollution Damage takes effect, limit of liability for all damages will be lesser of approximately $146 per adjusted net registered ton or approximately $15.4 million, in absence of owner's "actual fault or privity". When "Fund" Convention takes effect, claimants may recover up to a total of approximately $32.5.

TABLE A (Continued)

PROVISIONS	FLORIDA ACT	FEDERAL LAW AND INTERNATIONAL AGREEMENTS
		million. (See p. 40, *supra*).
Required evidence of financial responsibility.	Insurance or other approved evidence of financial responsibility to secure all liabilities (Applies to all vessels). [§ 376.14(1); cf. Regulations, §§ 16B-16.08(1)-(5)].	Insurance or other approved evidence of financial responsibility in amount of lesser of $100 per gross ton or $14 million, to secure Government cleanup costs. (Applies to vessels of over 300 tons). [33 U.S.C. § 1161(p)(1)].
Vessel equipment, inspection and manning.	Vessels using Florida ports must be equipped with state approved containment gear and be manned by crews trained in its use and are subject to state inspection for seaworthiness, etc. [§ 376.7 (2) (a), (c), (d)].	Vessels must meet equipment requirements and inspection procedures established by the President [W. Q. I. A., 33 U.S.C. §1161(j)(1)(C), (D)], detailed requirements regulating construction, equipment and inspection under 46 U.S.C. §§ 361-436, 1960 Safety of Life at Sea Convention, and Ports and Waterways Safety and Environmental Quality Act, 1972.
Conditions for use of ports (in addition to evidence of financial responsibility).	Minimum weather and sea conditions, as determined by state employees [§ 376.7(2)(g)];	Certificate of inspection and compliance with Ports and Waterways Safety and Environmen-

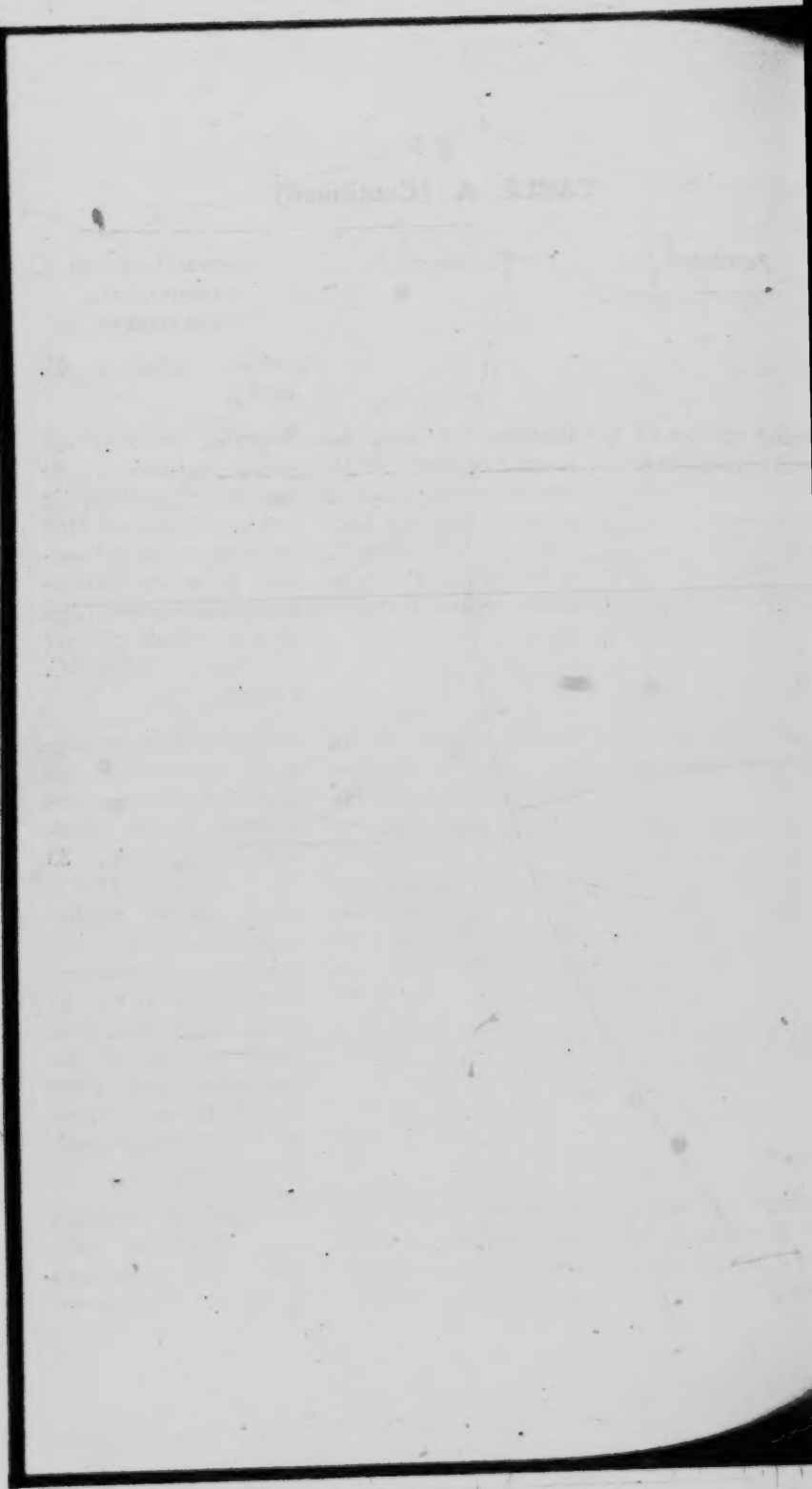

TABLE A (Continued)

PROVISIONS	FLORIDA ACT	FEDERAL LAW AND INTERNATIONAL AGREEMENTS
	master of vessel must file report and, inferentially, State may refuse entrance upon review of report. [§ 376.7(2)(h)(i)].	tal Quality Act of 1972. [P. L. 92-340 § 201(A)(3), (5), (6), (7); (B)(13)]; U. S. Coast Guard traffic control, including minimum sea conditions [*id.* § 101(3)(i)]; see also, Convention for Prevention of Pollution of the Sea by Oil, *as amended,* Article VII.
Reporting.	Discharge must be reported to state-appointed port manager, as well as to nearest Coast Guard Station [§ 376.7(2)(b)].	Discharge must be reported to Coast Guard unit in vicinity of discharge. [W.Q.I.A., 33 C.F.R. §§ 153.100 and 153.105].
Wrecks.	Abandonment of vessels without state agency's consent prohibited; owner subject to $50,000 fine for each day abandoned vessel remains. [§§ 376.15(1) and 16].	Owner has right to abandon to U.S. [33 U.S.C. §§ 409-14], subject to rule of *Wyandotte Transportation Co.* v. *United States,* 389 U.S. 191 (1967).
Civil Penalties.	Up to $50,000 per day for each day during which violation continues. [§§ 376.10; 376.16].	Up to $10,000 per violation under W.Q.I.A. [33 U.S.C. § 1161(b)(5)]; $500 to $2,500 for violation of Refuse Act [33 U.S.C. §§ 407 *et seq*];

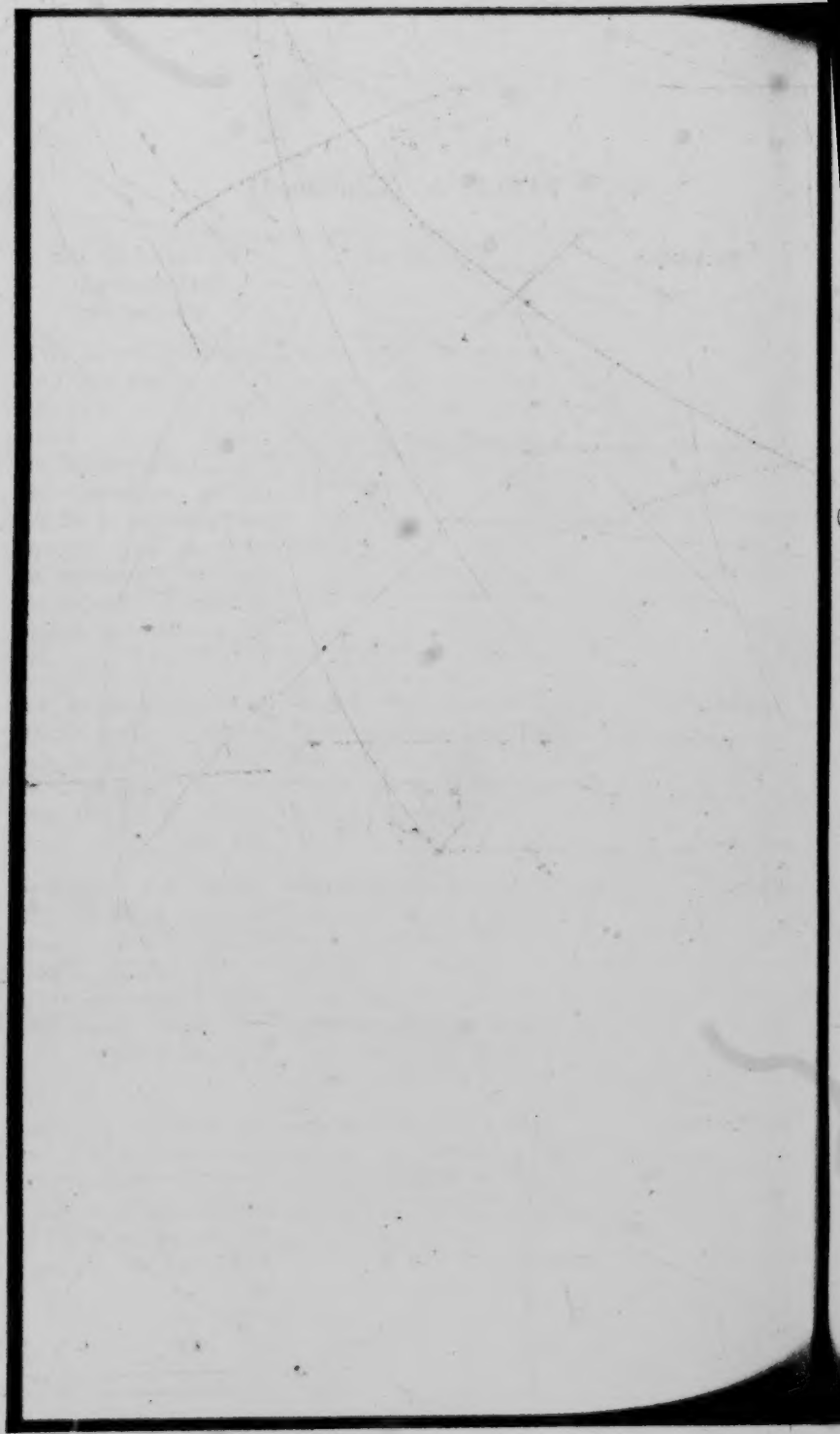

TABLE A (Continued)

PROVISIONS	FLORIDA ACT	FEDERAL LAW AND INTERNATIONAL AGREEMENTS
		up to $10,000 for violation of Port and Waterways Safety and Environmental Quality Act of 1972 [P.L. 92-340].
inal sanctions.	Imprisonment up to two years and fines up to $10,000. (Violation constitutes felony). [§ 376.12].	Imprisonment up to one year and fines up to $10,000 for failure to report a discharge [33 U.S.C. § 1161(b)(4)]; imprisonment up to 30 days and fines of $500 to $2,500 for violation of Refuse Act of 1899 [33 U.S.C. §§ 407 *et seq.*]; imprisonment for not more than 5 years and fines of $5,000 to $50,000 for violation of Ports and Waterways Safety and Environmental Quality Act, 1972 [Pub. L. 92-340].

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COMPARISON OF STATE WATER PO

	DELAWARE	FLORIDA	
CUT nec-	Title 7, Part VII, Chapters 60, 61, 63, 64; and Title 29, Chapter 80, DELAWARE CODE and *Implementing Regulations.* (Delaware Water Pollution Control Laws).	Chapter 376, FLORIDA STATUTES (1970) (Florida Oil Spill Prevention and Pollution Control Act).	GEO Chap Qual
ance per-	Avoidable pollution or contamination of the oceans or beaches shall be prohibited, and no oil, tar, nor refuse of any kind shall be permitted to pass into the waters of the ocean. § 6419(a). No person shall cause or permit the discharge of substances which impair the uses, or violate the water quality requirements, of the waters of the state. *Reg.* § 3-3.1.	Oil, gasoline, pesticides, ammonia, chlorine, and other hazardous materials. §§ 376.3(7), 376.-4.	Disp waste wate all r perm Act.
	Acts or omissions preventable through exercise of a high degree of care. § 6419(b)(1)(2).	Absolute. § 376.11(5) (b), (c); 376.11(6) (a); 376.12.	Inten of w sulti as d Stric any tic, amo § 21